EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

NO. 87-213

Supreme Court, U.S.
FILED
JUN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY KINCHELOE,

Petitioner-Appellant,

vs.

MARK HAYES,

Respondent-Appellee.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent, Mark Hayes, pursuant to Rule 46 and 18 U.S.C. § 3006A(d)(6), asks leave to file the attached Brief in Opposition without prepayment of costs, and to proceed in forma pauperis. Respondent was represented by the Federal Public Defender on (CJA) appeal to the United States Court of Appeals for the Ninth Circuit and remains unable to defray the costs of representation.

WHEREFORE, Respondent, by and through his undersigned counsel, respectfully prays that this Court grant leave to proceed in the Supreme Court of the United States in forma pauperis.

DATED this 18th day of June, 1986.

Respectfully submitted,

Thomas W. Hillier, II
Attorney for Respondent

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY KINCHELOE,

Petitioner-Appellant,

vs.

MARK HAYES,

Respondent-Appellee.

BRIEF OF RESPONDENT IN OPPOSITION

Thomas W. Hillier, II
Federal Public Defender
Attorney for Respondent

1111 Third Avenue, Room 380
Seattle, WA 98101

Telephone: (206) 442-1100
FTS 399-1100

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

LARRY KINCHELOE,

Petitioner-Appellant,

vs.

MARK HAYES,

Respondent-Appellee.

ON PETITION FOR A WRIT OF CERIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The decision of the court of appeals is reported at 784 F.2d, 1434.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1986. Mandate issued on April 10, 1986. Jurisdiction of this court is confirmed under 28 U.S.C. 1 1254(1).

STATUTES INVOLVED

Relevant provisions of statutes and constitutional provisions have been reproduced at pp. 2-8 of Petition.

INDEX

		PAGE
QUESTION PRESENTED		1
I.	STATEMENT OF THE CASE	2
	A. OVERVIEW OF THE CASE	2
	B. BASIS FOR OPINION	3
II.	ARGUMENT AGAINST GRANTING REVIEW	9
III.	CONCLUSION	17

QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals applied the correct standard of review in an action brought under Title 28 U.S.C. § 2254 challenging the validity of a guilty plea entered without an understanding of the elements of the offense.

I

STATEMENT OF CASE

A. OVERVIEW OF THE CASE

On April 3, 1980 Mark Hayes was arraigned in the Pierce County Superior Court in Tacoma, Washington. On that day he entered a plea of guilty to two counts of second degree murder in violation of RCW 9A.32.050(1)(a). He was sentenced on June 5, 1980 to two life terms of imprisonment. The sentences were ordered to run concurrently.

The defendant subsequently sought review of his guilty plea in the state appellate court system arguing that his plea was not knowingly and intelligently made because he was neither advised nor aware that the crime of second degree murder requires as an essential element, the intentional killing of a human being. The State of Washington denied post conviction relief.

The defendant then filed a petition for relief with the United States District Court for the Western District of Washington. The case was referred to a United States magistrate for a report and recommendation. An evidentiary hearing was held to develop facts and background relevant to the claim. Following the hearing, the United States magistrate requested and received further briefing on the issue before the court. On January 15, 1985, the

magistrate filed a report and recommendation with the United States District Court. After extensive analysis, the magistrate concluded that the petitioner's "plea of guilty was not voluntarily made since he did not receive real notice of the true nature of the charges against him, or possess an understanding of the law in relation to the facts." No objections to the report and recommendation of the magistrate were filed by the State of Washington. A district court judge adopted the report and recommendation of the magistrate and ordered the State of Washington to allow petitioner to withdraw his plea of guilty or the Writ authorizing his release would issue. The State of Washington determined to appeal the district court's order rather than allow the petitioner the opportunity to withdraw his plea of guilty.

The court of appeals affirmed the judgment of the district court in an opinion filed on November 17, 1986. [Pet. App. A].

B. BASIS FOR OPINION

In reaching its decision, the court of appeals relied heavily upon the record of proceedings before the state court and facts developed in the district court. Because the state record in particular reveals remarkable support for Hayes' claim that he did not know or understand

that he was pleading guilty to an intentional homicide, we take time to emphasize those portions of the record relied upon by the court of appeals.

The events leading to petitioner's conviction occurred on January 24, 1980. That night, a friend of Mark Hayes, Terrell Campbell, had an argument with two individuals at a Tacoma tavern. Mr. Campbell left the tavern and drove to Mr. Hayes' house. Shortly thereafter he returned to the tavern with Mr. Hayes and Mr. Hayes' girlfriend, Judy Wilson. In the parking lot of the tavern a violent confrontation broke out. Two individuals were shot and killed by Mark Hayes. The exact circumstances of the shootings are unclear. Mr. Hayes, Mr. Campbell and Ms. Wilson were all arrested shortly after the shootings. All were charged with two counts of first degree murder.

A plea agreement was ultimately reached in the case against Mr. Hayes. An Amended Information was filed against him charging two counts of intentional second degree murder in violation of RCW 9A.32.050(1)(a). Mr. Hayes pled guilty to the Amended Information on April 3, 1980. As part of the agreement struck in his case, the charges against his girlfriend were dropped.

Mr. Hayes entered his guilty plea before the Honorable Walter S. Stone, presiding Judge in Pierce County at the time. Judge Stone properly attempted to discuss the

element of intent with the prosecutor. The following relevant colloquy between the court and the prosecutor occurred at p.8 of the arraignment transcript:

> The Court: Okay. What particular intent is required on second degree, Mr. Connelly?
>
> Mr. Connelly: Well, during the assaults according to Mr. Hayes' statement, Your Honor.
>
> The Court: You feel it would be felony murder, you don't need to get any particular intent?
>
> Mr. Connelly: That's correct. The fact of the matter is both these people were shot twice, one after the other.

This fundamentally inaccurate statement of law and obvious misunderstanding by the Court and the prosecutor as to the intent requirements of RCW 9A.32.050(1)(a) constitutes the only discussion of that element by the Court at the time of the guilty plea.[1]

At the time of the plea, Judge Stone was also presented a handwritten statement from Mr. Hayes describing his version of the crime. Mr. Hayes wrote:

> Terrell came to my house to get my gun. I asked him what he needed it for. He said he was having trouble at the Yukon. I asked him would he have time to take Judy

---

[1]RCW 9A.32.050(1)(b) states the felony-murder rule as it applies to second degree murder. That statute was not used by the prosecutor because there was no underlying felony in this case. Mr. Hayes' guilty plea was entered under RCW 9A.32.050(1)(a), which requires proof of intent to kill. See eg., State v. Burt, 614 P.2d 654, 94 Wa.2d 108 (1980).

> and I to the store. We all went in the car. He went to the Yukon first. The big guy and the girl came out, everybody were talking. The big guy seemed angry so I went and got the gun, to scare him. Pookie and the girl started fighting and the big guy grabbed me and we started fighting over the gun. The gun fired it was all mixed up I don't remember too much else until later.

On June 5, 1980, Mr. Hayes returned to court for sentencing. The transcript of sentencing proceedings relates several comments relevant to the issue of intent. The prosecution spoke of the events leading to Mr. Hayes' conviction indicating:

> The defendant Mark Hayes and the defendant Campbell and perhaps others in the car were involved in it. But it was a confusing melee for much of the time. Shots were fired by Mr. Hayes. (Transcript of sentencing: P.23)

The prosecutor went on to state that:

> Mr. Campbell, the missing defendant here, in his statement to the probation officer indicated that the defendant Hayes shot Jackson twice in the head, first while Jackson was struggling with Mr. Campbell, then he went up and finished him off. Then he walked over and killed Ms. Ellis when she was essentially down and out.
>
> Now the Court heard me before on the way people try to pass the blame off from themselves once they bite the bullet and make a plea. This was a melee and I don't think we can conclusively believe everything that Campbell says. (Transcript of sentencing: p.24)

Thus, the prosecutor articulated facts which could suggest the homicides were intentional but he went on to note that the credibility of his witnesses and the confusion of the situation were of concern. Mark's attorney, John O'Connell spoke next and said little relating to the homicides or the issue of intent. However, at p. 29 of the transcript, he noted:

> I remember the statement there was that the man who was killed was a big man. He had a confrontation and then he went back and got the gun. Somebody gave him a gun, and he took the gun and went back with the intent to protect himself. (Emphasis added).

Mr. O'Connell's only comment on the issue of intent is a flat statement that Mark did not intend the homicides but, rather intended to protect himself.

Mark Hayes spoke on his own behalf. At p.31 of the transcript, Mr. Hayes stated:

> Also like to say that the crime that was committed by me was not deliberate crime, and the people that definately did or heard (sic) ...I understand the feelings of the families and mine, because I have lost a brother myself, and I know how they feel.
>
> If I hadn't of maybe struggled with the guy, then maybe no one would have got shot or anything. I know that my pulling the gun out, bringing the gun out was wrong, and I am willing to accept whatever penalty I have to pay. (Emphasis added).

Mr. Hayes himself told the judge that the crimes were not deliberate. Judge Stone spoke next and articulated the following compelling statement on the issue of intent. At p.33 of the transcript when passing judgment, he told Mark:

> Certainly the charge of murder in the second degree and Mr. Hayes' statement and perhaps the statements of every one else would indicate serious doubt as to whether anybody intended for anybody to get killed.
>
> I have trouble believing that anybody intended that somebody get killed in this. Yet Hayes deliberately sought out a confrontation or a drug rumble with a loaded weapon in his hand. Foreseeably, somebody getting killed is obvious.

Thus, Judge Stone told Mr. Hayes at the time of sentencing that there existed doubt that the homicides were intentional and that he had trouble believing that Mr. Hayes intended anyone to die. Mr. Hayes was then sentenced to life imprisonment.

The state record certainly supported Mr. Hayes' claim that he was unaware that he was pleading guilty to an intentional homicide. However, in an effort to explore all possibilities, the district court ordered an evidentiary hearing to take the testimony of Mr. Hayes and his attorney.

A deposition of Mr. Hayes' attorney was taken and introduced into evidence. On several occasions he was asked whether he recalled discussing with Mr. Hayes the elements of the offense. On each occasions this critical question was

posed, Hayes' attorney indicated that he recalled no discussion concerning the elements of the offense of second degree murder. In addition, he stated that discussions concerning the events leading to Mr. Hayes' arrest were minimal. Instead, he stated that discussions focused on plea bargain possibilities including dismissal of charges against Mr. Hayes' girlfriend, a goal ultimately reached.

Mr. Hayes testified that he and his attorney never discussed the elements of the offense. He corroborated the essence of his attorney's deposition and went on to note that he never understood he was pleading guilty to an intentional homicide.

Faced with this remarkable record, the court of appeals agreed that Mr. Hayes' plea was involuntary because he did not possess an understanding of the law in relation to the facts. [Pet. App. A, p. 20].

II

ARGUMENT AGAINST GRANTING REVIEW

The decision of the court of appeals is correct and poses no conflict with decisions of this Court or other ocurts of appeal. Review of this fact based opinion is therefore unwarranted.

The basis for Petitioner's request for review is not entirely clear. It seems that Petitioner's complaint is

broadly based, challenging exhaustion, standard of review and the correctness of the result. Each suggested challenge is specious as discussed below.

First, with respect to the exhaustion of state remedies, the court of appeals noted:

> Our concern for comity between State and Federal courts is satisfied if "the petitioner's federal claim has been fairly presented to the state courts." [Pet. App. A, p.9].

In recognizing the requirements of comity, the court of appeals cited to this Court's decision in Picard v. Conner, 404 U.S. 270, 275 (1971). The court of appeals went on to find that respondent Hayes exhausted his state remedies because he had presented his claim to both the Washington Court of Appeals and the Supreme Court of Washington. That claim, the same which was presented in federal court, was rejected by both Washington State appellate courts.

Apparently, it is petitioner's position that Hayes did not present the same claim at the state level as was presented at the federal level. This mystifying argument is belied by the state's previous stipulation to the exhaustion requirement. [Pet. App. A. p.10, fn.2]. Nevertheless, petitioner contends that exhaustion was not satisfied because "the defendant's claim in federal court (as phrased by the Magistrate) was not that the defendant had not been informed, but that he had not understood." [Pet. p.11]. Thus, it is

Petitioner's reasoning that not "understanding" what one is pleading to raises a substantially different claim than not being "informed" concerning the meaning of the plea. The petitioner's argument is meritless. At issue throughout all post conviction proceedings has been Mr. Hayes' contention that his plea of guilty was constitutionally involuntary because he did not understand the elements of the second degree murder statute. The fact that he did not understand the elements of the charge to which he is pleading flows, in part, from the fact that he was not informed of the elements of the offense. The issue is the same, and it was fairly presented in state court. Indeed, the Washington State Supreme Court apparently understood that which the petitioner does not. In denying Mr. Hayes' request for post conviction relief, the State Supreme Court found:

> To the extent that petitioner's real contention is that he was not properly informed of the intent element, the claim must still fail....
>
> ...A fair reading of the record as a whole shows that petitioner's plea was constitutionally voluntary, based on an adequate understanding of the nature of the charge and having an adequate factual basis. (our emphasis) [Pet. App. A. p.4].

Thus, it is clear that the state court ruled on precisely the same issue as that which was litigated in federal court. The interchangeable use of terms such as "informed" and "understood" all realte to the same

constitutional argument, an argument which was fully litigated in state court. Therefore, the court of appeals correctly found that state remedies had been exhausted.

Secondly, petitioner claims that the court of appeals should not have reviewed this matter "de novo". In applying that standard, the court of appeals recognized the ruling of this Court in Marshall v. Lonberger, 459 U.S. 422 (1983). In Marshall, this Court stated that the requirements of 28 U.S.C. § 2254(d) do not apply in determining whether a plea was voluntary because "the governing standard as to whether a plea of guilty is voluntary for purposes of the Federal Constitution is a question of federal law and not a question of fact". Questions of law are reviewed de novo. Marshall, at p. 431. The court of appeals went on to note that even while reviewing de novo, historical facts and inferences drawn therefrom are subject to the presumption of correctness afforded state court findings. Therefore, the court of appeals recognized and determined to apply the appropriate presumptions and standards of review as required by this Court. Lengthy analysis followed. The record, containing facts which were essentially undisputed, was discussed at length. Upon examination of that record, the court of appeals concluded that "the record does not support the decision of the state courts." [Pet. App. A p.16]. Therefore, the court of appeals determined that, under 28

U.S.C. § 2254(d)(8), the state court finding that Mr. Hayes "understood" what he was pleading to was not supported by the record and not entitled to a presumption of correctness. This conclusion flows naturally from the facts set forth above.

Finally, it seems the real complaint of the petitioner is its disagreement with the view of a federal magistrate, district court judge and three appellate court judges that the record in this case simply does not fairly support a conclusion that the plea of guilty was constitutionally voluntary. Petitioner may disagree with the finding of the court of appeals, but that finding was clearly correct and supported entirely by the record.

The tack of petitioner is to argue that the court of appeals ignored presumptions favoring petitioner's position and, instead, presumed facts in favor of Mr. Hayes. [Pet. p.17]. This argument is flatly contradicted by the record. The court of appeals painstakingly reviewed the facts applicable to Mr. Hayes' claim that his plea was involuntary because he did not know that an element of second degree murder is the intent to kill. The record is fraught with confusion as to the element of intent. The court of appeals correctly pointed out that both the judge and the prosecutor "expressed significant confusion regarding the intent requirement for second degree murder" at the time of

arraignment. [Pet. App. A. p.14]. In fact, the state's own representative utterly misstated the intent requirement in the presence of the defendant. At the time of sentencing, Mr. Hayes told the judge that the crime was not deliberate. The judge responded by indicating that "Mr. Hayes' statement and perhaps the statements of everyone else would indicate serious doubt about whether anybody intended for anybody to get killed." In short, records of proceedings at both arraignment and sentencing are void of evidence indicating that Mr. Hayes' had been advised of the intent requirement necessary for conviction of second degree murder. The state record did not include evidence of whether or not Mr. Hayes' attorney had advised him of the elements of the offense. Therefore, the United States magistrate ordered an evidentiary hearing at which the deposition of Mr. Hayes' attorney was introduced into evidence. At that deposition, Mr. Hayes' attorney indicated that he had no recollection of discussing the elements of second degree murder with Mr. Hayes. Mr. Hayes himself testified that no such discussion had taken place.

Based upon this record, the court of appeals found that:

> The judge, prosecutor, and Hayes' attorney failed to inform him of the elements of second degree murder. Hayes' guilty plea was involuntary because he did not possess an understanding of 'the law in relation to the facts'. McCarthy v. United States,

394 U.S. 459, 466 (1969); Sober v. Christ, 644 F.2nd 807, 809 (9th Cir. 1981).

[Pet. App. A. p.20].

In so finding, the court of appeals reviewed cases discussing claims of involuntary guilty pleas. See, e.g. Nash v. Israel, 707 F.2d 298 (7th Cir. 1983); Williams v. Raines, 783 F.2d 774, 775 (9th Cir. 1986); Chua Han Mow v. United States, 730 F.2d 1308, 1310 (9th Cir. 1984); United States v. Diaz, 733 F.2d 371, 374 (5th Cir. 1984); Smith v. Estelle, 711 F.2d 677, 680-681 (5th Cir. 1983). Those cases were readily distinguishable because there existed facts from which the court could determine that the defendant understood the nature of the charges to which he was pleading guilty. No such support could be found in the record following Mr. Hayes' plea of guilty. Instead, the court of appeals learned that, at all times, Mr. Hayes had contended that the homicides were unintentional. In addition, it was learned that Mr. Hayes' attorney neither discussed the specifics of the second degree murder charge with Mr. Hayes nor discussed the facts of the case in detail. The prosecutor and the judge expressed confusion concerning the requirement of intent as an element of the offense at the time Mr. Hayes entered his plea of guilty. And, finally, the judge himself indicated that he had trouble believing that Mr. Hayes intended to kill anyone during the melee which led to his arrest and conviction.

In sum, the court of appeals applied the proper standard of review in deciding that Mr. Hayes' plea of guilty was involuntary. State court findings were appropriately considered and weighed. The state court's conclusion that the plea was voluntary for constitutional purposes was not entitled to a presumption of correctness. Marshall v. Lonberger, supra, p. 431. That finding was necessarily rejected based upon the state of the record in this case. This essentially factual analysis raises no issue properly subject to review by this Court.

//

//

//

//

//

//

//

//

//

//

//

//

//

III

CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 10th day of June, 1986.

Respectfully submitted,

Thomas W. Hillier, II
Attorney for Respondent